

SERVED: January 18, 2000

NTSB Order No. EA-4815

UNITED STATES OF AMERICA
NATIONAL TRANSPORTATION SAFETY BOARD
WASHINGTON, D.C.

Adopted by the NATIONAL TRANSPORTATION SAFETY BOARD
at its office in Washington, D.C.
on the 13th day of January, 2000

_____)	
JANE F. GARVEY,)	
Administrator,)	
Federal Aviation Administration,)	
)	
Complainant,)	
)	Docket SE-15331
v.)	
)	
EVAN P. SINGER,)	
)	
Respondent.)	
_____)	

ORDER

NTSB Order EA-4767 (served May 21, 1999) invited the parties' comments on the Board's tentative judgment that respondent's counsel, Michael J. Pangia, should be sanctioned for submitting prohibited ex parte communications in connection with his efforts to obtain reconsideration of NTSB Order EA-4704 (served September 18, 1998), a decision sustaining the emergency revocation of his client's private pilot certificate.¹ The Board has determined, for the reasons discussed below, not to impose a sanction.

In response to the Board's show cause order, Mr. Pangia, by counsel, represents that he did not intend to keep from the

¹The Board in NTSB Order EA-4723 (served November 13, 1998) denied reconsideration.

Administrator or the Board's General Counsel the two-page transmittal letter that accompanied copies of the reconsideration request that was sent only to Board Members, but was not included with copies of the request filed with the Board (in its Office of General Counsel) or served on counsel for the Administrator. He attributes this failure of service, and other related discrepancies, such as the absence of any markings on the transmittal letters to indicate to whom else they were sent, to the inexperience of a new employee who left the firm before the problems involving service in this matter were brought to their attention.² This employee, it is asserted, did not follow instructions that should have insured proper service of all documents. Like the Administrator, we find this account insufficient to demonstrate that there was no intent to ex parte the Board Members.

It is certainly possible, as counsel for Mr. Pangia speculates, that a new, untrained clerical employee could have failed or neglected to send the two-page transmittal letter to everyone Mr. Pangia wanted to receive it.³ What seems highly unlikely, however, is that a green employee, without direction by Mr. Pangia, would prepare for his signature a second, one-line transmittal to accompany copies of the reconsideration request to be sent only to the Administrator and the Board's General Counsel or that any miscue, if there was one, in the preparation of two different transmittals would not have been discovered when they were presented to Mr. Pangia for signing. Because Mr. Pangia's response to the Board's show cause order makes no attempt to explain these crucial circumstances, his claim that service was not accomplished in accordance with his design can not be credited.

Although we conclude, consistent with the tentative finding in our show cause order, that Mr. Pangia's distribution to Board Members alone of a document relevant to the merits of the proceeding breached the prohibition in section 821.61(b)(1) of our Rules of Practice against ex parte communications, we have determined, on further review of the issue, not to impose any sanction on Mr. Pangia's privilege to practice before this

²Counsel asserts that steps have been taken at Mr. Pangia's firm to prevent a recurrence of the service irregularities that existed in this matter.

³Mr. Pangia did not file an affidavit along with the response filed on his behalf, and no sworn statement by the unidentified clerical employee believed to be responsible for what is essentially treated as errors of service was tendered.

agency, as was originally proposed.

Mr. Pangia does not appear, by his "extra" transmittal letter, to have been seeking to have the Board look at evidence that was not already in the record or that had been denied admission to the record by the law judge. Rather, he was, by berating the diligence, competence and impartiality of the Board and its staff for a decision he views as reflecting an erroneous judgment on a faulty reading of the record, attempting to forcefully register his belief that the decision should be revisited and changed. Had the Administrator not learned of the content of the transmittal, she would have been deprived of little more than knowledge of the depth of her adversary's conviction that the Board had made a mistake.

While the fact that the content of Mr. Pangia's ex parte submissions did not go outside the record does not legitimize in any way the backdoor tactic by which delivery of the information was effected, we are constrained to find that ex parte communications whose character is largely adverse personal opinion should not engender a significant penalty, given its low potential to improperly influence the Board's deliberations. We think it a sufficient rebuke in the context of this case to have unequivocally made known our disapproval of counsel's failed effort to gain advantage. No further action is necessary.

IT IS SO ORDERED.

HALL, Chairman, FRANCIS, Vice Chairman, HAMMERSCHMIDT, GOGLIA, and BLACK, Members of the Board, concurred in the above order. Vice Chairman FRANCIS submitted the following statement:

I approve only the order here that directs no further action in this case. The fact that an ex parte communication occurred seems sufficient for our purposes; a decision whether it was by intentional or negligent act seems relevant only to sanction, which we have declined to impose. I believe that our rules, in theory and in practice as shown here, are robust enough to avoid any potential, harmful influence and flexible enough to tolerate unusual circumstances that may occur in litigation.